

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & ALI-ARONI,
JJ.A.) CIVIL APPEAL NO.103 OF 2020**

BETWEEN

PETER NYOIKE GITHUKA

(Legal representative of the estate of

NJUGUNA CHEGE).....APPELLANT

AND

GITHINJI

RESPONDENT

**MURANG'A.....2ND
ATTORNEY GENERAL**

WAWERU.....1ST

LAND

RESPONDENT

REGISTRAR

THE HON.

3RD RESPONDENT

*(Being an appeal against the Judgment of the Environment and Land
Court at Muranga (Kemei, J.) delivered on 28th November, 2019*

in

E.L.C No. 370 of 2017)

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of the Environment and Land Court (hereinafter “ELC”), where the ELC dismissed the appellant’s claim over the suit property, Loc. 4/Gatitu/222, (the suit land). Being a first appeal, we are mandated to re-appraise the evidence, draw inferences of fact and arrive at our own independent findings- see ***Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR).***

The record of appeal reflects that the appellant was the plaintiff at the ELC, where he had sued the respondents seeking a declaration that the registration of the 1st respondent as the owner of the suit land was fraudulent. He sought cancellation of the 1st respondent's title and for the suit land to be registered to the estate of Njuguna Chege (his late father).

The appellant's case was that the suit land belonged to his late father, Njuguna Chege, who was registered as proprietor of the land on 17th December, 1966 after the adjudication process was completed in their area in central Kenya. The appellant told the court that in early 2009, the deceased reportedly expressed a desire to subdivide and transfer the suit land to his beneficiaries, and that is when they came to realize that the land was registered in the name of the 1st respondent. The deceased was to follow up on the issue, but he passed away before he could do so. The appellant accused the 1st respondent of fraudulently obtaining the suit land, and various particulars of fraud were set out in the plaint. The appellant stated that the deceased's family had never seen any person on the suit land claiming ownership of the land and that the 1st respondent had never set foot on the suit land.

The 1st respondent did not file a defence to the suit and did not participate in the proceedings at the ELC.

The 2nd and 3rd respondents took part in the proceedings by filing a defence. They stated that the suit land was indeed

registered to the late Njuguna Chege upon first registration on
17th December,

1966 and that the land was then transferred to Githinji Waweru, the 1st respondent, on 4th February, 1977. They stated that all processes necessary to effect transfer were followed.

In the judgment of 28th November, 2019, Kemei, J. held that the appellant had not proved any fraud regarding the transfer of the suit land to the 1st respondent and the suit was dismissed. The appellant was dissatisfied with those findings and filed this appeal.

The Memorandum of Appeal is dated 29th July, 2020, seeking to have the judgment set aside, the title in favour of the 1st respondent be cancelled, and the suit land be registered in favour of the appellant on behalf of the estate of his late father Njuguna Chege. The appellant states in grounds of appeal that the Court erred in finding that he had not proved his case; that the respondents never adduced any evidence in rebuttal to the claim; and that the Court failed to consider the appellant's weighty evidence. The Court is faulted for considering documents that were filed by the 2nd and 3rd respondents but were not produced into evidence, and for raising the standard of proof beyond what the law requires.

This appeal came up for hearing before us on 3rd June, 2025 on the Court's virtual platform. Learned counsel **Miss Waigwa** appeared for the appellant. There was no appearance for the respondents and we were satisfied that they had been served with a hearing notice on 21st May, 2025.

Counsel for the appellant relied fully on her written submissions.

We have considered the record of appeal, the submissions on record and the relevant law.

It is not in dispute that the appellant's late father Njuguna Chege, was the initial registered owner of the suit land as per the copy of title, which shows that he was registered as proprietor of the suit land on 17th December, 1966. That extract of the title shows that a transfer was registered in favour of the 1st respondent on 4th March, 1977. The appellant questioned the registration of the suit land to the 1st respondent terming the same as a fraud and collusion between the respondents, for reason that the deceased never sold or transferred the land during his lifetime at all and that it was only at the twilight of his life when the deceased decided to subdivide the land and transfer the same to his beneficiaries that he discovered the transfer effected in 1977 that he knew nothing about as he had never transferred the land to anybody at all but had occupied the same with his family all his life.

The trial court, in its judgment, stated that the 1st respondent had a valid title which could not be revoked without concrete proof of fraud. We are in agreement with that general principle of law that a title to land is indefeasible. However, we also echo the words of this Court in the case of ***Galaxy Realtors Limited vs. Kenya Forest Service (Civil Appeal 41 of 2020) [2024]***

KECA 1304

(KLR) (20 September 2024) (Judgment), where it was held that

possession of a title document is not conclusive proof of ownership of landed property when validity of that title is under question. This Court stated:

“However, even though the law provides for the indefeasibility of a title, the said principle is not absolute. The law regarding the indefeasibility of a title to land was settled with finality by the Supreme Court in Dina Management Limited vs. County Government of Mombasa & 5 Others (Petition No. 8 (E010) of 2021. In this landmark decision, the Supreme Court departed from the Torrens System of Registration and held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. This simply means possession of a registered title document by a property owner is not conclusive proof of ownership.”

We reiterate that the 1st respondent’s title was open to a valid challenge by the appellant, which the trial court should have considered in detail particularly since the 1st respondent’s ownership of the suit land was being questioned and where the appellant’s case was that title to the suit land had never been transferred and where the 1st respondent, who had been served with summons to appear in the suit had failed to appear or file a defence to challenge the appellant’s claim. This Court, in the case of **Teleposta Pension Scheme Registered Trustees vs. Intercountries Exporters Limited & 5 Others** (Civil Appeal 293 of 2016) [2024] KECA 870 (KLR) (12 July 2024) (Judgment) also confirmed that a registered proprietor of land

ought to establish the root of his or her title. The Court stated:

“The issue of indefeasibility of title in relation to Section 23 of RTA has been addressed in several decisions of this Court. In Munyu Maina v Hiram Gathiha Maina [2013] eKLR this Court stated as follows: “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

We are of the considered view that the title held by the late Njuguna Chege was never challenged. Rather, the title held by the 1st respondent was under challenge. The 1st respondent never filed a defence to answer to the claims made against him. The 1st respondent passed away during the pendency of the proceedings and was substituted with Rose Githinji, his widow, on 11th October, 2017. His widow also never defended the suit to rebut the allegations by the appellant and never brought forward any evidence to prove her husband’s root of title. Consequently, we find that the appellant’s claims against the 1st respondent were not controverted.

On their part, the second and third respondents filed a joint defence indicating that the transfer of the suit land to the 1st respondent was done legally after lodging of transfer documents and the Land Control Board consent. The 2nd and 3rd respondents

went ahead to file a list of documents wherein it was indicated that

there was a duly signed transfer form, but we note that the said documents are not in the record of appeal and were not produced into evidence at all. The proceedings reflect that no witness testified for the 2nd and 3rd respondents' case, and counsel for the 2nd and 3rd respondents closed their case without any evidence being offered. Therefore, the transfer documents alleged to exist were never tabled before the trial court, and the ELC was in error to refer to them in the impugned judgment.

We agree with the finding of this Court in the case of **Karugi & Another vs. Kabiya & 3 Others** [1983] eKLR, where the Court stated;

“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”

We also echo the sentiment of this Court in the case of **Megvel Cartons Limited vs. Diesel Care Limited & 2 Others** (Civil Appeal 70 of 2018) [2023] KECA 184 (KLR) (17 February 2023) (Judgment) wherein it was stated:

“The learned Judge therefore did not misdirect himself by failing to find that the appellant had proved its' case on a balance of probabilities and in believing the evidence of the 1st respondent, since failure by the appellant to adduce evidence to rebut the 1st respondent's evidence meant that the evidence of the 1st

respondent remained uncontroverted.”

In light of all the foregoing, we find that the appellant's evidence at the trial court was never controverted by any of the respondents and that the title deed to the suit land held by the 1st respondent was not a valid title as its root was not established. The appellant proved, on a balance of probability, that he and his family had resided on the land since the first registration and that his late father had never transferred the land to the 1st respondent. The 1st respondent or his widow did not offer any evidence to show that the transfer effected in 1977 was valid in any way at all.

We hereby set aside the judgment by the ELC and find merit in this appeal, which we allow. We allow the appellant's suit at the ELC and grant the prayers sought there as prayed. There shall be no order as to costs in the circumstances of the case.

Dated and delivered at Nyeri this 28th day of November, 2025.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI - ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the*

original
Signed
DEPUTY REGISTRAR